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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-1256, 79-1479

TURLOCK IRRIGATION DISTRICT, et al.,
Petitioners,

vs.

CITY & COUNTY OF SAN FRANCISCO,
Respondent.

UNITED AIRLINES, INC., et al.,
Petitioners,

vs.

CITY & COUNTY OF SAN FRANCISCO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The City and County of San Francisco, Respondent in the above-entitled cases, respectfully requests the Court to deny the petitions for writ of certiorari seeking review of the Ninth Circuit's decision in these cases.[1]

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[1] The Petition filed by the Turlock and Modesto Irrigation Districts (No. 79-1256) will be referred to herein as "Districts' Pet.", while the Petition filed by United, Trans World and American Airlines (No. 79-1479) will be cited as "Airlines' Pet.". The Appendices to the Districts' Petition will be cited as "Districts' Pet. App.".

QUESTION PRESENTED

Under the Raker Act, which provides that rates for surplus electric power generated by San Francisco shall be "fixed under the laws of California" and that "in the absence of such laws", rates shall be approved by the Secretary of the Interior, does the contingent power of the Secretary to review rates arise where: (1) the rates are set by the San Francisco Public Utilities Commission pursuant to provisions of the San Francisco City Charter, a law of the State of California, which delegates to San Francisco the power to fix rates and prescribes certain procedures which the City must follow; (2) the City's rates must conform to substantive standards of state law which require that rates be reasonable, equitable, and non-discriminatory; and (3) judicial review in the state courts is available to the City's power customers to test whether the foregoing standards have been observed?

STATEMENT OF THE CASE

A. Factual Background.

In 1913, Congress enacted the Raker Act, granting to San Francisco the right to develop and construct a system of dams, reservoirs, and electrical generation facilities within Yosemite National Park and Stanislaus National Forest. P.L. 63-41, 38 Stat. 242 (1913). Pursuant to this grant, San Francisco constructed these facilities, at a cost to it of $169,000,000.[2]

This system—known as the Hetch Hetchy project—generates a substantial amount of electricity. While Congress anticipated that San Francisco would acquire the means of distributing this power directly to its residents, this has not occurred. *See Starbuck v. City and County of San Francisco,* 556 F. 2d 450, 456 (9th Cir. 1977). Bond issues to

[2] Hearings on H.R. 5964 Before the Committee on the Public Lands, House of Representatives, 77th Cong., 2d Sess. 28 (1942) [hereafter "1942 Hearings"].

finance the acquisition or construction of a system for delivering Hetch Hetchy power to the residents of San Francisco have been rejected by the voters. 1942 Hearings, n.2, *supra,* at 82. And the cost of acquiring the means of delivery today would probably be prohibitive. *Starbuck v. City and County of San Francisco, supra.* Thus Hetch Hetchy power cannot be delivered by San Francisco to its citizens so that they might directly enjoy the benefits of this aspect of the Hetch Hetchy project.[3]

San Francisco's initial solution to this problem was to consign the electric power to P.G.&E. for delivery to retail customers in San Francisco. However, in 1940, the Court held that these arrangements violated Section 6 of the Raker Act,[4] which it construed to forbid the consignment as well as the sale of electric power to any corporation or individual, other than a municipality or water district, for ultimate delivery to others. *United States v. City and County of San Francisco,* 310 U.S. 16 (1940).

Because San Francisco can neither obtain its own distribution system nor consign Hetch Hetchy power to P.G.& E. for delivery to its own citizens, it has been forced to realize the benefits of the Hetch Hetchy project it built in another way. San Francisco sells the surplus power to several categories of customers, including the Districts (which purchase the power

[3] Because of this, San Francisco's citizens are forced to rely on the more costly power generated by Pacific Gas & Electric Co. (P.G. & E.).

[4] Section 6 of the Raker Act provides as follows:

> "That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided,* That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

for resale to their customers)[5] and the tenants of the San Francisco Airport, such as the airlines who are petitioners in No. 79-1479.

In the mid-1970's, rates for P.G.& E. power began to rise dramatically, largely as a result of substantial increases in the cost of fossil fuel from which much of P.G.& E.'s electricity is generated. C.T.(TM) 145.[6] In 1975, the Public Utilities Commission of San Francisco approved a new rate schedule which established increased rates for surplus Hetch Hetchy commercial power at levels comparable to those charged by P.G.&E. Stipulation ¶24.[7] These rates were not based on the actual costs of generating and delivering electric power, but rather were related to the market value of the power. Stipulation ¶34. Further increases in rates were approved in 1976 and 1977. Stipulation ¶¶39, 42. The effect of the increases San Francisco has adopted is to increase its revenues from the sale of Hetch Hetchy power (Stipulation ¶33); these revenues are used to defray the costs of other activities within the jurisdiction of the City's Public Utilities Commission (such as the maintenance and operation of the electric power supply of the Municipal Railway) and to reduce the burden upon the taxpayers of San Francisco by transfer of some of these revenues into the general fund. These increased rates have not been approved by the Secretary of the Interior.

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[5] The Districts also purchase "Class 1" power, at cost, for their own use in operating irrigation pumps and for municipal purposes. The Districts have a statutory right to receive this power on a priority basis at cost. Raker Act § 9(1). No issue is presented here concerning the delivery or pricing of Class 1 power.

[6] References to the Clerk's Transcript on Appeal will be cited as "C.T. ___". However, where from the context it may not be clear whether the reference is to the record in the *United Airlines* case or the *Turlock-Modesto* case, citations will be to "C.T. (UA) ____" or "C.T. (TM) ____", respectively.

[7] This reference is to a Stipulation of Facts [hereafter cited as "Stipulation"] in the *United Airlines* case. Apparently because of difficulties in copying, the Clerk did not include it in the Clerk's Transcript on Appeal but instead filed it separately with the Ninth Circuit.

B. The Litigation.

The *United Airlines* case was commenced when several air line customers of San Francisco refused to pay the increased charges for electric power. Suit was originally brought by San Francisco in the San Francisco Superior Court (C.T. 7) and thereafter removed by the defendants to the United States District Court for the Northern District of California. C.T. 1. In their Answers, the airlines contended that San Francisco's rate increases were illegal (1) under state law, because they were "arbitrary, capricious and not supported by substantial evidence"; and (2) under the Raker Act, because they had not been approved by the Secretary of the Interior, as allegedly required by the Act. C.T. 11-12. The Department of the Army intervened in the action, as did the Secretary of the Interior. C.T. 78-84.

After the parties filed cross-motions for summary judgment, the District Court entered an order granting partial summary judgment for the City. It determined that "the increased rates charged by [the City] for electric service . . . are not subject to review by and do not require approval of the Secretary of the Interior." C.T. 188, 189. The District Court certified the issue under 28 U.S.C. § 1292(b) (C.T. 190), and the Ninth Circuit allowed the appeal. C.T. 191. Still pending before the District Court is the issue of whether the rates are reasonable and lawful under California law.[8]

The *Turlock-Modesto* case was commenced by the Districts in March, 1977 in the Eastern District of California. C.T. 1. As in the *United Airlines* case, the Secretary of the Interior asked for and was granted leave to intervene. C.T. 208-225, 338. On February 8, 1978, the District Court entered a Memorandum and Order (C.T. 506) concluding—contrary to the holding of the Northern District of California in the *United Airlines*

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[8] The District Court's order granting only partial summary judgment in effect retained jurisdiction over the airlines' alternative contention that the rates fixed by the San Francisco Public Utilities Commission were "unreasonable" under state law and hence unlawful. *See* R.T. Hearing of September 15, 1977 at 55.

case—that under Section 9(o) of the Raker Act, prior approval of the Secretary of the Interior is required of all rate increases.

On appeal, the Ninth Circuit consolidated the cases for decision, affirmed the District Court's ruling in the *United Airlines* case and reversed in the *Turlock-Modesto* case. It held that the Raker Act does not require the approval of the Secretary of the Interior for San Francisco's commercial power rates. The court rejected the argument of petitioners that because the framers of the Raker Act anticipated that San Francisco's rates would be regulated by the California Railroad Commission, only that particular regulatory scheme would obviate the need for secretarial approval. Districts' Pet. App. at A-8. Relying on the Act's legislative history (*see* pp. 11-13, *infra*), the court concluded that the Act's framers believed that the contingency which would trigger secretarial approval was the "absence" of any form of California law applicable to municipal ratemaking:

> "It would appear then, that the language in question was construed by the bill's supporters as providing a very narrow role for secretarial approval; so long as California maintained a responsible system under law for the fixing of rates the Secretary should not intervene." (*Id.* at A-9-10).

The court concluded that California did indeed maintain "a responsible system under law for the fixing of rates":

> "[T]he San Francisco Public Utilities Commission does not have complete control or the final say over the rates for Hetch Hetchy power. The same criteria of reasonableness of rates apply to a municipality as apply to private utilities. The rates charged must be 'fair, reasonable, just, uniform and non discriminatory * * *' 12 McQuillan, Municipal Corporations §35.37(a), at 483. Rates charged are subject to judicial review. *See, e.g., City and County of San Francisco v. Western Airlines, Inc.*, 204 Cal. App. 2d 105, 22 Cal. Rptr. 216 (1962)." (Districts' Pet. App. at A-7).

The Ninth Circuit also relied on this Court's decision in *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). In that case, in considering whether the power consigned by the City to P.G.& E. had, in effect, been sold to P.G.& E., the Court noted that "the rate paid by consumers for the Hetch Hetchy power is not fixed by the City, *as it could be under the Constitution of California*, it is fixed by the State Railroad Commission just as the price of all other power sold by the Pacific Gas & Electric Company in California is fixed." *Id.* at 27-28 (emphasis added). And the Court's ultimate conclusion in that case was that the arrangement between the City and P.G.& E. violated the Raker Act because the City had "abdicated *its control* over the sale and ultimate distribution of Hetch Hetchy power." *Id.* at 20 (emphasis added). The Ninth Circuit stated:

> "We read this language of the Supreme Court as expressing the view that the fixing of rates by the San Francisco Public Utilities Commission rather than by the State Commission not only was permitted under the Act but would more nearly comport with the congressional intent.
>
> "We conclude that subject to judicial review as to their reasonableness, rates established by the San Francisco PUC pursuant to the City Charter do 'conform to the laws of the State of California' in accordance with Section 9(o) of the Raker Act. There is, then, no occasion for securing the approval of the Secretary." (Districts' Pet. App. at A-11).[9]

[9] In a separate portion of its opinion, the Ninth Circuit affirmed the District Court's order denying the Districts standing under the Raker Act and compelling them to arbitrate their dispute with San Francisco. Noting that the Raker Act itself gives the Districts no right to commercial power, the Court held that the Districts' only right to such power was by virtue of the City-District contracts, a right which San Francisco denied existed. Because the contracts contain an arbitration clause, the court held that the dispute between the City and the Districts should be arbitrated. *Id.* at A-12-13.

ARGUMENT

I. THE QUESTION PRESENTED BY THIS CASE DOES NOT WARRANT REVIEW BY THE COURT.

This case presents a question of federal law under a statute which affects only a modest portion of a single state. Five federal judges—the three-member panel of the Court of Appeals and two district judges—have considered this issue and four of them have agreed with the City that there is presently no such "absence of California law" so as to require secretarial approval of San Francisco's commercial power rates. In our view—and in the view of the Secretary of the Interior and the Solicitor General—the matter should be put to rest now.

Stripped to its essentials, this is an intrastate dispute between San Francisco and its commercial power customers over who should gain the benefits of the relatively cheap hydroelectric power generated by the Hetch Hetchy system. How much San Francisco charges these customers is of primarily local concern; federal law is involved only because of the historical and geographical accident that San Francisco's power is generated from land within Yosemite National Park. While commercial consumers of the City's electric power have an interest in cheaper rates, that interest is fully protected under California law which requires that the City's rates be "reasonable". *See* pp. 14-15, *infra*. Even if it were not, protecting commercial consumers in California with regard to locally-

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(Footnote continued)

Although the Districts' claim that this ruling was "clear error" (Pet. at 6), the "questions presented" in their Petition present no issue as to the validity of this portion of the Ninth Circuit's order. Because "[o]nly the questions set forth in the Petition or fairly comprised therein will be considered by the Court" (Sup. Ct. R. 23.1(d)), there is no need to address this issue at this juncture.

generated power is hardly an issue of paramount federal concern, worthy of the Court's attention.

While the Secretary of the Interior has resisted the City's position that his approval of San Francisco's rates is not required under the Raker Act, he has joined with the City in recognizing the inappropriateness of this case for further review by this Court. On January 23, 1980, Secretary Andrus wrote the Department of Justice recommending that the Solicitor General not file a petition for certiorari in these cases. (A copy of this letter is attached as Appendix A to this brief.) The Solicitor General, in turn, has filed a memorandum which states that, in his view, "this case lacks sufficient general importance to warrant further review." Memorandum for the United States at 5.

Two points in Secretary Andrus' letter are worthy of special note. First, the Secretary states that "the proper construction of the Raker Act on [the question of secretarial approval] is a very narrow issue with no implications for any other part of the Raker Act, or any other program of this Department." App. A. 1a-2a. The Solicitor General agrees, stating: "The decision below does not affect provisions of the Raker Act other than those involved here, nor does it affect other programs or projects administered by the Secretary of the Interior." Memorandum for the United States at 5. Second, the Secretary notes that "not seeking review will allow [the Department of the Interior] to avoid becoming involved in local rate setting, an area in which this Department has limited expertise . . . ." App. A, at 2a. As the responsible administrator of the Department of the Interior and the official charged by the Raker Act with monitoring the City's compliance therewith (Raker Act, §9(u)), the Secretary's views as to the lack of importance of this case for the overall administration of the Raker Act and its marginal impact on his Department's prog-

rams are entitled to great deference. *Udall v. Tallman,* 380 U.S. 1 (1965).[10]

The only Raker Act case ever accepted by the Court, *United States v. City and County of San Francisco, supra,* differs from this case in several important respects. In that case, the federal interest in preserving the City's conformity to the Raker Act was asserted by the United States, whose function it is to enforce compliance with the conditions therein contained; here, by contrast, the United States has not only not sought certiorari, but instead suggested that "this case lacks sufficient general importance to justify further review." Memorandum for the United States at 5. Moreover, *United States v. San Francisco* involved important constitutional issues involving the power of Congress over federal property. *See* 310 U.S. at 29-30. This case, by contrast, involves no constitutional issues at all, only a

[10] The Districts suggest in a footnote that the Secretary's views on the "certworthiness" of this case are contradictory to his position on the merits and that this change in position is the result of a political "gift." Districts Pet. at 5-6, n.4. These accusations—which are based on a newspaper account speculating about the Secretary's position rather than on any statement by Secretary Andrus himself—are totally unfounded. There is nothing inconsistent between the Secretary's position on the merits and his views as to the inappropriateness of Supreme Court review. The Court's workload would doubtless be less onerous if more counsel recognized—as has the Secretary—that not every defeat suffered in the courts of appeals warrants a petition for certiorari. Indeed, in making this distinction, the Secretary was acting in the highest tradition of government counsel in this Court. *See* Note, *Government Litigation in the Supreme Court: the Roles of the Solicitor General,* 78 YALE L.J. 1442 (1969) (discussing function of Solicitor General in screening federal government certiorari petitions). Whatever the newspapers may say, Secretary Andrus has neither "relinquished" anything nor bestowed a political "gift"; all he has done is to determine that, from the perspective of his Department, the present case is insufficiently important for the government to petition for certiorari. And the Solicitor General—whose integrity and independence Petitioners have not questioned—agrees with the Secretary of the Interior. *See* Memorandum for the United States at 5-6.

limited question of statutory construction which ultimately turns upon an evaluation of a particular set of state law rules and procedures to determine whether they prescribe ratemaking "under the laws of the State of California." Such a case raises no issues worthy of this Court's attention.

II. THE NINTH CIRCUIT'S DECISION IS CORRECT.

The heart of Petitioners' argument on the merits is that the framers of the Raker Act meant to subject San Francisco's power rate to "regulatory oversight" (Districts' Pet. at 9) by the California Public Utilities Commission (formerly known as the Railroad Commission) or some similar agency and that in the absence of such regulation, the rates are subject to Secretarial approval. The Court of Appeals, however, refused to interpret the Act as requiring "a specific regulatory scheme" to obviate the need for Secretarial approval. Districts' Pet. App. at A-8. The Court of Appeals' decision was correct.

We readily concede that those involved in the drafting and debate of the Raker Act contemplated that rates for Hetch Hetchy electric power would be fixed by the California Railroad Commission. *See, e.g.,* House Hearings 110-11; 50 Cong. Rec. 3920, 3980, 3997, 4000, 4092, 4093, 4096, 4107; 51 Cong. Rec. 55 (1913). It is also apparent that this expectation was in error, for in 1920 the Supreme Court of California ruled that the Commission lacked jurisdiction over the rates charged by municipally-owned utilities. *City of Pasadena v. Railroad Commission,* 183 Cal. 526, 192 P. 25 (1920).

The Court of Appeals correctly held that the Raker Act's language—"under the laws of California" and "conform to the laws of the State of California"—embraces more than a particular state regulatory system. Indeed, the language on which the final wording was based—that proposed by the then Secretary of the Interior—was that rates be fixed by "such legal authority as is *or may be* constituted for fixing rates or charges *in* the State of California." House Hearings at 20-21 (emphasis added). Obviously, the possibility of change in the laws

applicable to ratemaking was contemplated. Nothing in the legislative history suggests that Congress meant to insist that California adhere to any particular form of regulating or fixing electric rates or is inconsistent with the nearly self-evident proposition that Congress meant what it said: that Secretarial approval would not be required so long as California maintained a responsible system under law for the fixing of rates. If Congress had intended to insist upon adherence to a system whereby rates were fixed by the Railroad Commission, it would have said so.

The residual provision allowing the Secretary to determine the rates for power "in the absence of such laws [of California]" (§ 9(m); *see also* § 9(o)) was viewed by Congress in precisely the manner which the language clearly suggests: as a backup in the unlikely event that California ceased to have legal standards or a legal system pursuant to which rates were set. That Sections 9(m) and (o) contemplated this exeedingly narrow role for the secretarial-approval mechanism is made plain in an exchange between Senator Borah (an opponent of the Act) and Senator Norris (who favored it), in what is the most comprehensive discussion of the provision in question in the entire legislative debate. Referring to Sections 9(m) and (o), Senator Borah protested that the power to fix rates was exclusively a state matter, and could not be impaired by federal law. The following colloquy then ensued:

> "Mr. NORRIS. Then, assuming further that there is *no law* or that there might come a time when there is *no law* in California fixing the rates, does not the Senator think *in an emergency of that kind* there ought to be some provision by which the rates *could not be exorbitant or unreasonable?*
>
> "Mr. BORAH. Yes.
>
> "Mr. NORRIS. Then, under a condition of that kind, assuming that it should arise, what objection has the Senator to the balance of the provision which gives the right to the Secretary of the Interior?

> "Mr. BORAH. My objection is that in the first place we have no power or authority to send a federal officer into a State to perform one of the sovereign functions of a State—that is, to fix rates." (51 Cong. Rec. 288 (1913) (emphasis added)).

In response to this objection, Senator Norris sought to assure Senator Borah that the conditions which would trigger the Secretarial rate-fixing power were exceedingly limited:

> "Mr. NORRIS. I have assumed that the State *has no law.*"
>
> . . . .
>
> . . . . That [condition of an absence of State law] *undoubtedly will never arise,* but for the sake of considering the particular provision, I think it is fair to assume that the condition has arisen. I assume it only for the purpose of considering that proposition." (*Id.* (emphasis added)).

The condition which Senators Norris and Borah, and doubtless the entire Congress, thought so unlikely has never occurred. Although the Public Utilities Commission of California does not fix the rates for Hetch Hetchy power, those rates *are* fixed "under the laws of California" (Raker Act §9(m)) and thus "conform to the laws of . . . California" (§9(o)) in ways which, while different from the mechanism envisioned by members of Congress, protect the interests with which Congress was concerned—protection against "exorbitant" or "extortionate" rates—as fully as would have the Railroad Commission.

In the first place, San Francisco's power to fix electric rates is governed by California law. Section 3.598 of the Charter of the City and County of San Francisco confers upon the Public Utilities Commission "the power to fix, charge and adjust rates . . . for the furnishing of service by any utility under its jurisdiction", subject to the oversight of the Board of Supervisors. *See also* Cal. Const., Art. XI, §9(a). A city charter is,

by law, "the law of the State and [has] the force and effect of legislature enactments." Cal. Const., Art. XI, §3. The current San Francisco Charter was submitted to and approved by the Legislature in 1971. Cal. Stats. 1971 Res. Ch. 273. And the Charter expressly prescribes procedures which the Commission must follow in fixing rates:

> "Before adopting or revising any schedule of rates or fares, the commission shall publish in the official newspaper of the city and county for five days notice of its intention so to do and shall fix a time for a public hearing or hearings thereon, which shall be not less than ten days after the last publication of said notice, and at which any resident may present his objection to or views on the proposed schedule of rates, fares or charges." (Charter § 3.598).[11]

Moreover, San Francisco fixes electric power rates subject to substantive limits imposed by the laws of the State of California and subject to review in state courts of general jurisdiction. The general principles of law governing the fixing of rates for municipally-owned utilities have been summarized as follows:

> "The rates charged by a municipally owned utility must be fair, reasonable, just, uniform and nondiscriminatory, and the same rules in regard to the reasonableness of private utility companies apply. . . . A municipality cannot impose arbitrary charges under penalty of forfeiture of the right to use the supply. A rate retroactively increased has been held to be void. Judicial review may usually be had as to the reasonableness of the rates." (12 McQUILLIN, MUNICIPAL CORPORATIONS, §35.37a at 483-84).

[11] The process for the fixing of electric rates is also governed by the Ralph M. Brown Act. Cal. Gov't. Code § 54950-61. Action must be taken by a majority (*id.* § 54952.6) at a meeting open to the public (*id.* § 54953) subject to specific rules regarding such matters as time, place, and notice to the public. *Id.* §§ 54953-56.

California law adheres to these general principles. Rates must be reasonable and, if they are not, are subject to judicial review in the courts of California. *City and County of San Francisco v. Western Air Lines, Inc.*, 204 Cal. App. 2d 105, 134-41, 22 Cal. Rptr. 216, 234-38 (1962); *Durant v. City of Beverly Hills*, 39 Cal. App. 2d 133, 102 P.2d 759 (1940); *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 593, 93 P. 490, 496 (1908). "'[T]he charges must be reasonable, fair and equitable, must be fixed by ordinances which are not arbitrary, and must be uniform and without discrimination against particular property owners.'" *Boynton v. City of Lakeport Mun. Sewer Dist.*, 28 Cal. App. 3d 91, 94, 104 Cal. Rptr. 409, 411 (1972) (quoting from *Corpus Juris Secundum*). The Supreme Court of California recently acknowledged and approved this body of law. *County of Inyo v. Public Utilities Commission*, 26 Cal. 3d 154, 161 Cal. Rptr. 172 (1980).

Indeed, the airlines' own pleadings refute their claims that there is an "absence of [California] law" governing San Francisco's power rates. In response to the City's allegation that they had refused to pay the increased rates, the airlines filed answers interposing two affirmative defenses. The second of these was that San Francisco's rates had not been approved by the Secretary of the Interior, as allegedly required under the Raker Act. But the airlines' primary affirmative defense was that San Francisco's rate increase was:

> "[a]rbitrary, capricious and not supported by substantial evidence in that it purported to collect from defendant costs not incurred by plaintiff in selling such electric power and energy, being based upon the cost of generating electricity by burning fuel oil when the electricity sold to defendant was in fact generated by hydroelectric plants, and is *therefore unlawful under the laws of the State of California.*" (C.T. 11-12).

The position of the airlines is thus hopelessly contradictory: on the one hand, they contend that San Francisco's rates are invalid under state law and that they are therefore entitled to

judicial relief while, on the other, contending that there is an "absence" of state law governing San Francisco's rates which necessitates secretarial approval. Both positions cannot be right. The airlines' invocation of state law is a tacit admission that those rates *are* governed by the law of California. Thus secretarial approval is not mandated.[12]

In sum, San Francisco does not set rates for Hetch Hetchy power in a legal vacuum. It acts by virtue of authority delegated by the State. It must proceed in accordance with legal processes, including those set forth in the Charter and in the Ralph M. Brown Act. And, perhaps of greatest importance, San Francisco is restrained from enacting "exorbitant" or "extortionate" rates—or, indeed, rates that are simply unreasonable—by substantive standards of state law. Any failure of San Francisco to comply with these procedural or substantive standards is reviewable in the courts of California. The Court of Appeals was therefore correct in concluding that there is no

[12] The matrix of California procedural and substantive law in which San Francisco fixes its rates undermines the extravagant (and for purposes of these petitions, legally irrelevant) claims pressed in the Petitions, which make repeated mention of "windfall profits" (Districts' Pet. at 7, 8, 16) and "exorbitant rates". Districts' Pet. at 3, 8; Airlines' Pet. at 3. State law protects the Districts and the airlines against "exorbitant rates," since that law, in the words of the answers filed by the airline Petitioners, prohibits rates which are "arbitrary, capricious and not supported by substantial evidence." Because rates fixed under state law must be reasonable, Petitioners' fear of being overcharged by the City is chimerical; they have substantive rights under state law which they have every right to assert in the courts of California. Indeed, their claim that the rates charged them by San Francisco are excessive under state law is pending before the District Court in this case.

There is, of course, a disagreement between the parties—which the District Court will have to resolve—over whether San Francisco's rates may reflect the market value of the power or must be based on the actual costs of generation and distribution. That issue was not decided by the Court of Appeals and is not before this Court.

"absence of such laws [of California]" (Raker Act § 9(m)) as gives rise under the Raker Act to the power of Secretarial approval.[13]

The Districts argue that there is a "30-year history of approval by the Secretary of Interior of rates for Hetch Hetchy power sold to the Districts." Districts' Pet. at 7. If this statement is meant to suggest a relevant administrative construction of the Raker Act, the suggestion is wholly without merit.

In the first place, it is undisputed that at no time did the City have a practice of submitting all rates for commercial

[13] The airlines rely on statements in a recent opinion of the California Supreme Court (*County of Inyo v. Public Utilities Commission, supra*) to the effect that there are significant procedural differences between PUC regulation and judicial review of rates for reasonableness. Airlines' Pet. at 8-9. Because "[t]he PUC maintains an expert, independent staff to investigate rate requests," while a court "must depend upon the expert testimony presented by the parties," that court concluded that "while judicial review can protect consumers against plainly unfair rates, [it] does not offer an opportunity for the detailed analysis and careful structuring of rates possible in a PUC proceeding." *Id.* at 159-60, 161 Cal. Rptr. at 715.

The *County of Inyo* case, however, is irrelevant to the present controversy. The California Supreme Court plainly did not hold that judicial review of rates for reasonableness is an ineffective remedy, for the court was careful to note that such review "can protect consumers against plainly unfair rates." *Id.* at 160, 161 Cal. Rptr. at 175. Moreover, the PUC's expertise in rate-setting is irrelevant to this case, for whatever the outcome here, that body will not review the City's rates, for it has no power to do so under state law. That, indeed, is what the *County of Inyo* case holds. Here the rate-setter preferred by Petitioners, the Secretary of the Interior, has stated that his department has "limited expertise" in "local rate-setting". App. A at 2a. Hence Petitioners cannot argue that displacing rate review by the California courts with the Department of the Interior enhances the potential for expert rate-setting comparable to that of a state public utilities commission. Instead, the net effect of displacing the California courts by the Secretary would be to weaken local control over an essentially local controversy without a countervailing gain in expert decision making.

power to the Secretary. It has *never* submitted rates charged to customers other than the Districts (such as the airline Petitioners); until this litigation, the Secretary never asserted that it should. And, as explained to the Court of Appeal (*see* Brief For the City and County of San Francisco at 28-31, n.17), such secretarial review of rates charged the Districts as did occur starting in 1945 was the coincidental result of review by the Secretary of the substantive provisions of *contracts* between the District and San Francisco *which was conducted for a completely different purpose*—namely, to ensure compliance with this Court's mandate in *United States v. City and County of San Francisco, supra;* the Secretary did not purport to review the City's rates under any authority conferred by Sections 9(m) or 9(o) of the Raker Act. Thus, there has never been a consistent pattern of Secretarial review of the City's rates in the entire history of the Hetch Hetchy project, and no prior administrative interpretation of Sections 9(m) or 9(o). Doubtless for this reason, counsel for the Secretary conceded in the District Court that there was no relevant prior administrative practice or interpretation. R.T. (UA) Hearing of Sept. 15, 1977, quoted in Brief For the City and County of San Francisco at 30-31 n.17.

Indeed, if there is any relevance in the history of the administration of the Raker Act by the Department of Interior, it is that from its passage in 1913 until the present dispute in the mid-1970's, the Secretary of the Interior *never* asserted the power to review San Francisco's rates under Sections 9(m) or 9(o) of the Raker Act. The Court of Appeals was correct in declining to require such review at this late date.

The petitions in this case seek review upon a false premise. They base the Question Presented on the premise that "there is *no regulation* of such rates by the State of California . . . ." Districts' Pet. at 2; Airlines' Pet. at 3. We have shown, and the Court of Appeals found, that the State of California *does* regulate the fixing of San Francisco's rates by specifying

procedures to be followed and substantive standards to be observed, all enforceable in the courts of California.

Thus the question which is truly presented here is quite different. It is whether the 1913 Congress intended in effect to *require* California to use a particular process for setting rates—the Railroad Commission—or whether it meant only to require, as the Court of Appeals held, that there be "maintained a responsible system under the law for the fixing of rates . . . ." Districts' Pet. App. at A-10. It is inconceivable that in 1913 Congress had so little regard for the interests of federalism that is would have seen fit to dictate to California the *form* of rate regulation which must be applied to electric power generated at Hetch Hetchy. Accordingly, the judgment of the Court of Appeals is correct.

CONCLUSION

The Petitions should be denied.

DATED: May 13, 1980.

Respectfully submitted,

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APPENDIX A

Honorable Alice Daniel
Acting Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Re: *City and County of San Francisco v. United Airlines*, Nos. 77-3826, 3827; Nos. 78-1778, 2859 (9th Cir. filed Sept. 25, 1979) (Justice ref: DGL: CMVassanelli)

Dear Ms. Daniel:

After careful consideration, we have decided not to recommend filing a petition for a Writ of *Certiorari* seeking Supreme Court review of the Ninth Circuit's decision. That court held that Hetch Hetchy power rates are fixed under *state law* if they have the approval of the *City's* Public Utilities Commission (P.U.C.) and thus do not require the Secretary of the Interior's approval under subsections 9(m) and 9(o) of the Raker Act, 38 Stat. 224.

The Ninth Circuit rejected our argument that in enacting the Raker Act, Congress intended that the Secretary of Interior review and approve Hetch Hetchy power rates to insure that the purposes of the Raker Act were being observed unless a *statewide* utilities commission, such as the former Railroad Commission of California, had such a rate review and approval role. The court also recently denied, without formal opinion, the government's request for rehearing in the above-cited case.

It seems to us that (1) the Court of Appeals' decision is not so wrong on its face as to require Supreme Court review; (2) the proper construction of the Raker Act on this point is a very narrow issue with no implications for any other part of the

Raker Act, or any other programs of this Department; (3) the equities of this case do not cut sharply against the city; at bottom, the issue is whether the city, or its customers for surplus power (including an airline and other airport tenants, two irrigation districts and industrial concerns), should receive the benefit of the relatively cheap Hetch Hetchy hydroelectric power; (4) not seeking review will allow the Secretary to avoid becoming involved in local rate-setting, an area in which this Department has limited expertise; and (5) not seeking review of such a narrow question would conserve the limited resources of the Supreme Court for more appropriate cases.

As you know, other parties adversely affected by the Ninth Circuit decision may seek Supreme Court review; therefore, I ask that you keep my Deputy Solicitor, Mr. Ferguson, advised of the status of the case. If the United States' views are to be offered to the Supreme Court, I trust we will be consulted beforehand.

Sincerely,

/s/ CECIL B. ANDRUS
Secretary

cc: Kenneth Geller
Deputy Solicitor General